Claims Report

United States Army Claims Service

Personnel Claims Notes

Don't Throw It Out

The Army recently lost an appeal because claims office personnel told the claimant he could discard broken items. This was wrong advice; broken items must be kept for carrier inspection.

The claimant, a lieutenant colonel, owned expensive Baccarat and Atlantis crystal which was delivered broken. He shipped twenty-four crystal glasses of varying size, four crystal decanters, eight coasters, and a crystal punch bowl with twelve crystal glasses. The total value was $1450. Unfortunately, the claimant followed the advice of the claims office and disposed of the broken crystal.

The carrier sent a repair person to the shipper's home well within the forty-five day inspection period. When the carrier discovered that the crystal had been discarded, it informed the claims office that it intended to deny all liability because it had been denied its right to inspect.

In *National Forwarding*,[1] the Comptroller General noted that "[a] carrier cannot usually avoid being held *prima facie* liable for loss or damage to the household goods it transports merely because circumstances prevent it from inspecting the damage. This general rule applies where the carrier's conduct contributed in any manner to its failure to inspect."[2]

In this situation, however, the general rule did not apply because the carrier complied with all requirements and did not compromise its inspection rights. The Comptroller General noted that:

> Our decisions also recognize that a carrier is not liable when it vigorously pursues its inspection rights within the time permitted in its contract; the shipper discards the damaged item within the time that the carrier was permitted to inspect it and before the carrier had the opportunity to do so, and the record indicates that the carrier had a substantial defense involving facts discoverable by inspection.[3]

Discarding the broken crystal violated two Military-Industry Memorandums of Understanding (MOU). The MOU on Loss and Damage does not permit disposal of broken glass prior to carrier inspection.[4] The MOU on Salvage specifically indicates that broken crystal items worth more than $50 must be retained for carrier salvage.[5] The Army was told to refund the entire $1450.

The Army appealed arguing that the carrier did not deserve a "windfall" as the inventory clearly reflected shipment of crystal. The Army agreed that the claimant should not have thrown out the crystal, but also contended that the carrier should be partially liable, suggesting a reduced liability of $915.60, a figure based on a more moderately priced crystal.

The Comptroller General rejected this attempt at compromise and reaffirmed its prior holding[6] stating, "As we found in our original decision, it is undisputed that the carrier pursued its inspection rights and that the Army did not accord such rights."[7]

A similar situation occurred in *Stevens Worldwide Van Lines*.[8] In *Stevens*, a shipment was delivered to Alabama, and the shipper subsequently relocated to Florida. All of the items were moved, except a damaged water bed which the soldier gave to a neighbor to repair. The neighbor in Alabama could not repair the water bed and threw it out. Though the Comptroller General denied the carrier's argument that it was denied its right to inspect for the items moved to Florida, the Comptroller General allowed offset for the water bed. The Comptroller General noted that the carrier vigorously pursued its inspection rights, but the water bed was discarded before it could inspect, and prior to the termination of the carrier's inspection period.

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[1] Comp. Gen. B-260769 (Nov. 1, 1995).

[2] *Id.* at 2.

[3] *Id.*

[4] Dep't of Army, Pam. 27-162, Legal Services: Claims, app. E, sec. II (15 Dec. 1989).

[5] *Id.* app. E, sec. I.

[6] National Forwarding, Comp. Gen. B-26076.2 (June 27, 1996).

[7] *Id.* at 2.

[8] Comp. Gen. B-251343 (Apr. 19, 1993).

Claims offices must inform soldiers that the carrier has a right to timely inspection of damaged items, and that items should not be disposed of prior to the termination of the inspection period. It would be wise to have soldiers telephone the claims office before they dispose of any article. If the carrier's forty-five day inspection period has expired (*i.e.*, forty-five days have passed since dispatch of the last DD Form 1840R, Notice of Loss or Damage), it may be permissible to discard the item. However, if it appears that the full depreciated value may be paid for the item, then the question of salvage is important. In that case, it would be wise to ask the carrier if it has any interest in the item for salvage purposes. If the carrier is interested, then the item must be kept for possible salvage. Detailed records of these phone calls must be made on the chronology sheet. Ms. Schultz.

Unclear Correspondence

In some cases, letters sent to claimants are either unclear or just plain confusing. Phrases like "have not substantiated," "failed to show proof of tender," and "no proof of ownership" may be clear to claims personnel, but are not clear to claimants. Such confusion often results in a request for reconsideration that might have otherwise been avoided.

A claim recently sent to the United States Army Claims Service (USARCS) for reconsideration involved a request for $75 for a broken vase. The field office allowed $20 and told the claimant he had not substantiated the value claimed. The claimant requested reconsideration asking what he needed to do. The field office again replied that he had "failed to substantiate his claim" and sent the file to the USARCS.

Such confusing responses waste time and this particular response led to a request for reconsideration, requiring the field office to draft a seven paragraph memorandum forwarding the claim to the USARCS. A better approach is to draft a personalized letter telling the claimant the reason for the adjudication in plain, simple English. Anything less than the full amount claimed may not satisfy the claimant but knowing the full reason for the settlement may make it more acceptable. Mr. Lickliter.

Tort Claims Note

Problems with Settling Environmental Claims

Unique issues are involved in the handling of claims based upon environmental contamination, or toxic torts, under the Federal Tort Claims Act (FTCA).[9] The term "toxic tort," which has become a generally accepted legal phrase, is used to refer to a wide variety of factual situations which range from very specific single incidents with a definite number of claimants and no long-term tort risks (such as a pipeline break involving limited damage to adjacent property), to very general allegations of liability for neurotoxic or other deleterious effects caused by specific chemicals in our industrial operations.

For the claims officer in the field, it can be intimidating to deal with a claim based upon an allegation of damage from a toxic substance allegedly released by the Army. Though the investigation of a toxic tort is similar to that of other claims, knowing some basic initial steps can help focus your actions.

A toxic tort is often defined or classified by a range of characteristics. Like any claim, the complexity of the facts surrounding the claim often determines the scope of the investigation required. Are there many potential claimants? Is the contamination widespread and migratory? Are the claims for present as well as future personal injuries? Are the claims based on an isolated event with allegations of only property damage? Are the causation issues highly technical or readily ascertainable?

Tort damage issues are complicated by the potential for additional non-tort related liabilities because of environmental regulatory statutes, such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[10] Moreover, the resolution of tort liability may need coordination with ongoing investigations and cleanup activities conducted pursuant to the Defense Environmental Restoration Program (DERP)[11] or with other active facility operation and maintenance funded response actions. The DERP is a statutory program that authorizes the Secretary of Defense to carry out a program of environmental restoration at current and formerly used defense sites without resorting to either Superfund or Environmental Protection Agency (EPA) jurisdiction. Investigations are performed by the United States Army Corps of Engineers (USACE). It is important to note that these programs do not create any new FTCA remedies, nor is action taken under them an admission of liability under the FTCA.

Potentially complex damage issues involve the diminution of property values, loss of income, and other elements of property damages that are often difficult to determine when there are ongoing remedial efforts and long-range clean-up plans. Environmental claims amenable to settlement at the administrative stage are often isolated incidents. At times, they allege damages that are both relatively easy to determine and readily distinguishable from DERA response obligations.

Keep in mind that filing a claim is an administrative requirement prior to filing suit under the FTCA. For claims involving large environmental damages, the filing of the administrative claim is often done only because it is a necessary prerequisite to litigation.

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[9] 28 U.S.C. §§ 2671-2680 (1994).

[10] 42 U.S.C. §§ 9601-75 (1995).

[11] 10 U.S.C. § 2701 (1996).

As a practical matter, the settlement of an environmental claim as an ordinary tort is likely only if it involves property damage. If personal injury or wrongful death are either alleged or a future possibility, the handling of the claim will be done in consultation with the Environmental Law Division, Office of the Judge Advocate General, and Environmental Torts Branch, Civil Division, Department of Justice.

The initial response from the responsible Area Claims Officer or Claims Processing Officer should include the following steps:

a. Upon receipt, send a copy of what you believe may be an environmental claim to your USARCS Area Action Officer. A determination will be made whether the claim should be processed as an environmental claim. If so, the USARCS will notify ETB and ELD for instruction.

b. For claims involving active installations or activities, notify your local military or Department of the Army civilian environmental law specialists who are located at either the installation or MACOM level to determine whether there is a file on the site in question.

c. For claims involving closed installations or activities, contact the USACE Headquarters' Environmental Restoration Division's Formerly Used Defense Sites (FUDS) Branch in Washington, D.C., at (202) 761-1272 for information on the USACE district that might be involved in DERP-FUDS related activities at the site. Involved districts, though not responsible for dealing with FTCA claims at FUDS, can provide historical information, the status of any ongoing or planned investigations or clean ups, and technical data on contaminants present on the site.

d. Determine the stage and status of the clean up which may take several years to complete. The legal staff must ensure that the command and the civilian community understand that if an installation elects to take affirmative responsive action, it is done under DERP and not because of FTCA tort liability. Mr. Savino.